

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Inventors:	Michael Smith, Ali Golshan, Jeffrey Ym Wang, Neelima Mehta, Venkatesh Janakiraman		
Assignee:	Cisco Technology, Inc.		
Title:	VIRTUAL NETWORK DEVICE		
Application No.:	10/666,306	Filing Date:	September 18, 2003
Examiner:	Brian S. Roberts	Group Art Unit:	2419
Docket No.:	CIS0294US	Confirmation No.	7927

Austin, Texas
November 30, 2009

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Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450

PETITION FOR REVIEW OF PATENT TERM ADJUSTMENT
UNDER 37 C.F.R. § 1.705(b)

Dear Sir:

Applicant petitions for a review and correction of the patent term adjustment (PTA) that has been calculated for the above-noted application. As explained below, Applicant submits that the calculated PTA of 804 days is incorrect, and that in accordance with *Wyeth v. Dudas*, 580 F. Supp. 2d 138 (D.D.C. 2008), the correct PTA for the present application is 1130 days.

A Notice of Allowance and Issue Fee(s) Due was mailed on September 4, 2009 (the “Notice of Allowance”) for the present application. The Notice of Allowance set a due date of December 4, 2009 for payment of the issue fee. This petition is timely submitted along with or prior to the issue fee, in accordance with 37 C.F.R. § 1.705(b).

The Notice of Allowance included a Determination of Patent Term Adjustment under 35 U.S.C. § 154(b). According to that determination, the PTA for the present application is 804 days. This calculation is explained on the Office's PAIR web site, which includes an outline of the Office's calculation.

In accordance with the 37 C.F.R. § 1.705(b)(2), Applicant states the following.

- (i) The correct patent term adjustment for the present application is **1130 days**. This correction follows from the correct assessment of days that “overlap” in the calculation of PTA under 35 U.S.C. § 154(b)(2)(A). *See Wyeth v. Dudas*, 580 F. Supp. 2d 138 (D.D.C. 2008).
- (ii a) The period of adjustment under 37 C.F.R. § 1.703(a) is **965 days**, beginning on the day after November 18, 2004 (the date that is fourteen months after September 18, 2003, which is the date on which the application was filed under 35 U.S.C. § 111(a)) and ending on July 11, 2007 (the date of mailing of an action under 35 U.S.C. § 132).
- (ii b) The period of adjustment under 37 C.F.R. § 1.703(b) is **622 days**, beginning on the day after September 18, 2006 (the date that is three years after September 18, 2003, which is the date on which the application was filed under 35 U.S.C. § 111(a)) and ending on June 1, 2008 (the date before Applicant's first Request for Continued Examination under 35 U.S.C. 132(b) was received and filed in the Office records).
- (ii c) No period of adjustment is applied in the present application under 37 C.F.R. § 1.703(c), since there was no delay due to an interference.
- (ii d) No period of adjustment is applied in the present application under 37 C.F.R. § 1.703(d), since there was no delay due to a seal or to a secrecy order.
- (ii e) No period of adjustment is applied in the present application under 37 C.F.R. § 1.703(e), since there was no delay due to an appeal.

- (ii f) The periods of adjustment in (ii a) and (ii b) include an overlap, which is to be deducted from the sum of the adjustment periods under 37 C.F.R. § 1.703(f).

From the above statements, it is clear that the calendar days that actually overlap is the calendar period of **296 days**, beginning on the day after September 18, 2006 and ending on July 11, 2007.

Section 1.703(f) provides that “[t]he term of a patent entitled to adjustment under § 1.702 and this section shall be adjusted for the sum of the periods calculated under paragraphs (a) through (e) of this section, to the extent that such periods are not overlapping.” This sum is 965 + 622 days, less the 296-day period of overlap, resulting in 1291 days.

(Section 1.703(f) further provides that this period should be further adjusted “less the sum of the periods calculated under § 1.704.” This reduction is discussed below.)

- (iii) The present application is not subject to a terminal disclaimer.
- (iv) 161 days are deemed under the Office’s procedures to constitute “Applicant Delay” from deemed failures to engage in reasonable efforts to conclude processing or examination under 37 C.F.R. § 704.

The sum of these periods under § 1.704 is 161 days. The reduction under § 1.703(f) thus leads to a final PTA calculation of $1291 - 161 = 1130$ days.

Applicant believes that the disparity between the above calculation and the attached calculation from the Office’s PAIR web site arises from the Office’s current practice of considering “overlap” days. Applicant understands that the Office considers the entire period of 622 days under § 1.703(b) to “overlap” with the period of 965 days under 37 C.F.R. § 1.703(a). In *Wyeth*, however, the District Court of the District of Columbia held that that approach is in conflict with the statutory language in 35 U.S.C. § 154.

Under the correct calculation, as described by the *Wyeth* court, only the 296 calendar days that are actually in common between these two periods are considered to “overlap” under § 154. The disparity in the count of overlap days (622 days vs. 296 days, which is a difference of 326 days) leads to the 326-day error between the Office’s calculation of 804 days of PTA and the correct calculation of 1130 days, as detailed above.

In view of this error, **Applicant respectfully requests that the calculated patent term adjustment for the present application be corrected to indicate 1130 days of patent term adjustment.** The undersigned hereby authorizes that the fee under 37 C.F.R. § 1.18(e), and any other fees required for this submission, be charged to deposit account no. 502306.

I hereby certify that this correspondence is being electronically submitted to the Electronic Filing System EFS-Web of the US Patent and Trademark Office in accordance with § 1.6(a)(4) on November 30, 2009

Respectfully submitted,

/Brenna A. Brock/
Attorney for Applicants

November 30, 2009
Date of Signature

/Brenna A. Brock/

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